



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.572 OF 2013

BETWEEN

DENISH GUMBE OSIRE..... PETITIONER

AND

CABINET SECRETARY, MINISTRY OF DEFENCE.....1ST RESPONDENT

ATTORNEY GENERAL2ND RESPONDENT

JUDGMENT

Introduction

1. In his Petition, the Petitioner describes himself as a male adult of sound mind hailing from Migori County in the Republic of Kenya and avers that his fundamental rights and freedom of liberty, protection against torture, inhuman and degrading treatment, deprivation of property, secure protection of the law, protection against arbitrary search and entry as well as protection from discrimination guaranteed by **Sections 72, 74, 75, 76, 77 and 82 of the Repealed Constitution** were violated by the Military and other Government security agents following his unlawful incarceration between 16th November 1982 and 10th February 1983, a total of 86 consecutive days, in both military and civil custody after he was falsely and maliciously accused of participating in the 1st August 1982 failed coup attempt by members of the Kenya Air Force.

2. In his Petition dated 27th November, 2013, he specifically prays for the following declarations and orders:

a) A declaration that the circumstances under which he was arrested, searched, interrogated, tortured and unlawfully incarcerated by military and other government authorities between 16th November 1982 and 10th February 1983 and unlawfully discharged from military service constituted violations of his rights and freedoms of liberty, protection from torture, inhuman and degrading treatment, deprivation of property, secure protection of the law, protection against arbitrary search and entry and protection from discrimination guaranteed by sections 72, 74, 75, 76, 77 and 82 of the now repealed Constitution of Kenya.

b) A declaration that the failure, refusal and/or neglect of the Chief of General Staff and the Kenya Army commander to redress the Petitioner's written complaints and pleas for review of his case and re-instatement back in service in accordance with Sections 83 and 226 of the Armed

Forces Act (Cap 199) constituted cruel, degrading and inhuman treatment and was in violation of Section 74 of the Constitution of Kenya.

c) Award of damages consequent upon the above declarations and/or such orders, writs or directions for the purpose of enforcing and securing the enforcement of the provisions hereinabove disclosed as having been violated against your Petitioner.

d) The Respondents to pay the costs of the Petition.

The Petitioner's Case

3. In his Petition, oral testimony before this Court and in his Affidavit in support thereof sworn on 27th November, 2013, as well as in submissions The Petitioner's case was that he was enlisted in the Kenya Armed Forces on 1st September 1978 and thereafter he attended basic military training at the Armed Forces Training School Lanet, Nakuru. Upon completion of the said training, he was issued with a Kenya Army Service Number 10357 and was immediately posted to the 1st Kenya Rifles (1KR) based at the Nanyuki Barracks, Laikipia County. That sometime in 1981, he was trained as a Clerk General and attached to the 1KR Quarter Master's (QM) office as a clerk and he carried out his clerical duties without incident and was never charged with any military service misconduct, either before his Office Commanding (OC) the Barracks who was also the QM nor the Commanding Officer (CO) at the said Barracks.

4. It is also his case that in the early hours of 1st August 1982, while he was in the Married Quarters at the Barracks aforesaid, together with his wife and two young children, he heard a loud unit alarm summoning all ranks for the CO's Orders. That as per their military training, he and the other soldiers then present in the 1KR military camp jumped into their full battle dress, signed for their arms and ammunition from the unit Armoury Store and assembled at the 1KR parade square ready for their CO's Orders. A superior officer then informed them that there had been an attempt to overthrow the Government of Kenya by soldiers from the Kenya Air Force and they were required to disarm and capture the rebellious soldiers from the nearby Nanyuki Air Base. They proceeded as ordered to the Nanyuki Air Base and after applying various battlefield tactics they easily subdued and apprehended the rebellious members of the Kenya Air Force and being one of the few clerks then present in the 1KR, he was tasked by the OC Headquarter Company (HQ COY) to prepare a return of the names of soldiers who had participated in fighting the said rebellious soldiers of the Kenya Air Force. He prepared the list which also included his name and delivered the same to the OC who promptly signed it and ordered him to dispatch the same to the Kenya Army Headquarters, Nairobi, an order that he promptly executed.

5. It is his further case that after several weeks of unease after the attempted coup, the situation returned to normal and he resumed routine military duties at the 1KR. The Petitioner further recalled that on/or about 16th November 1982, at about 6.00 pm he was the duty clerk at the Battalion Headquarters while one, Captain Joseph Wanyoike was the unit duty officer. He then saw the Regimental Sergeant Major (RSM) Warrant Officer 1 (WOI) Mohammed Jillo and about four (4) Regimental Policemen (RPs) enter his office. The said RSM roughly ordered him to stop everything he was doing, stand up and join those with whom he had tried to overthrow the Government of Kenya. The Petitioner states that he was shocked and dumbfounded and recalls the RSM informing him that they were looking for a "jaluo" (one from the Luo ethnic group) from 1KR who had been implicated in the attempted coup and that he fitted the description of that "jaluo".

6. That the said RSM then roughly demanded to know his whereabouts on 1st August 1982 and he responded that he had been with his family in the Married Quarters and later bravely participated in the quelling of the rebellion and/or coup attempt by the Kenya Air Force Soldiers. That the RSM however rejected his explanation and immediately struck him hard on the lower left part of his abdomen using the official RSM parade stick. The RP's accompanying the RSM then pounced on him and beat him up mercilessly, dragged him out of the Battalion Headquarters office while raining punches and kicks on him with their hard military boots and then tossed him into the back of their Land Rover motor vehicle, took

him to the 1KR guardroom and locked him up in a cell full of cold water.

7. It is his contention that as a result of the aforesaid inhuman and degrading treatment at the hands of the aforesaid RSM and RP's, he sustained serious injuries which included a dislocation of his right ankle, two broken ribs, cuts and bruises on both legs and arms and pains all over his body. He added that scars from the above injuries are to this day still visible on his body and he openly showed them to this Court. The Petitioner added that he has been informed by his advocate that the above inhuman and degrading treatment constituted a violation of his fundamental rights guaranteed by **Section 74** of the **Repealed Constitution** and also informed him that the action by the RSM also constituted the offence of ill-treatment of a subordinate by a superior officer attracting a term of 5 years' imprisonment under **Section 63** of the **Armed Forces Act, Chapter 199, Laws of Kenya** (now repealed).

8. Further to the above, the Petitioner states that in the early morning of 17th November 1982, he was frog-marched to the Married Quarters by the RSM, RP's and the Military Police (MP) where they forcefully entered and conducted an arbitrary and illegal search which revealed nothing connecting and/or linking him to the coup attempt. He further states that he was later informed by his advocate that the aforesaid forced entry into his house at the Married Quarters and the arbitrary and illegal search therein constituted a violation of his fundamental right against arbitrary search and entry guaranteed by **Section 76** of the **Repealed Constitution**. That his house was thereafter locked up and his wife and two young children were unceremoniously thrown out of the Nanyuki Barracks and his wife was not even allowed to carry any personal household items from their Quarters which included his brand new bicycle, a Sanyo television and Sanyo music system, two imported suits and other miscellaneous household items all of which have cost him dearly. That the items have to date never been returned to him and he adds that he has been informed by his advocate that the aforesaid deprivation of his private property constituted a violation of his fundamental right to property guaranteed by **Section 75** of the **Repealed Constitution**.

9. Further to the above, according to the Petitioner, he was upon arrest, transported under tight security to Eastleigh Air Base, Nairobi, where he was interrogated by a senior army officer by the name of Captain Ndono, now retired and whose whereabouts are unknown. That the officer asked him questions regarding the coup attempt but he was unable to provide any answers to the said questions whereupon the officer then ordered the guards on duty to lock him up in the Eastleigh Air Base guardroom. He alleges that he was once again incarcerated in a guardroom cell filled with water and he has been informed by his advocate that the above inhuman and degrading treatment constituted a violation of his fundamental rights guaranteed by **Section 74** of the **Repealed Constitution**. He further states that his said advocate has informed him that the action by Captain Ndono also constituted the offence of ill-treatment of a subordinate by a superior officer attracting a term of 5 years' imprisonment under **Section 63** of the **Armed forces Act, Chapter 199, Laws of Kenya** (now repealed).

10. The Petitioner has also alleged that, on 18th November 1982 at about 0600 hrs he was taken out of the aforesaid water filled cell and handed over to Kenya Prisons Service Personnel who transported him and a few other uniformed personnel in their prison lorry to the Naivasha Maximum Security Prison. That all along he had not appeared before his OC, CO or Court Martial to answer any allegation and/or charges as required by the law. He further states that based on information given to him by his advocate, **Section 80** of the **Armed Forces Act, and Rules 3, 4, 5, 6, 7 and 9** of the **Armed Forces Rules of Procedure** provided that arrests, confinements and accusations against persons subject to the aforesaid Act, were to be reported in the form of a charge to the accused person's CO who was to investigate the same. That he is further informed by his advocate that the said irregular arrest and confinement was an offence under **Section 84** of the **Armed Forces Act**, and was punishable by a term of 2 years in prison.

11. In addition, that , on entering the Naivasha Maximum Security Prison premises, he was forcefully stripped naked and was pushed into a small dark room van which transported him into another part of the Maximum Prison where he was locked up alone in a cell while stark naked. Later in the evening, he was provided with blood soaked and filthy prison uniform and he remained in solitary confinement from 18th November 1982 until sometime in early January 1983 when he was taken before an "interrogation panel" where he was asked questions alleging his involvement in the aborted coup of 1st August 1982. In the course of the interrogation, he allegedly demanded of his interrogators to produce the person who had

falsely and maliciously implicated him in the above coup attempt as alleged by WOI Mohammed Jillo at the time of his brutal arrest in Nanyuki Barracks on 16th November 1982. He allegedly received no response from the interrogators and no accuser was produced nor his name given and instead, the angry interrogators led by one Major Robb ordered the Prison Warders to lock him up in an underground cell with knee deep dirty cold water. That he remained in the underground cell for four (4) nights with neither food nor water.

12. Further, that on the 5th day, cold, hungry and extremely weak, he was carried out of the aforesaid underground cell and placed before the interrogators panel led by the said Major Robb who demanded that he provide them with names of his friends and anybody who might have told him of plans to overthrow the Government of Kenya. They promised that if he did so, they would allow him to eat food, drink water and sodas which were displayed in front of him, and further that they would release him to report back to his unit and continue with Military Service but since he had not been involved in any way whatsoever with the abortive coup and since he was not one to make false accusations, he was unable to provide his interrogators with the names and/or information they were seeking. He was therefore denied the food, water and sodas earlier promised and two prison warders were ordered to remove him from the interrogation room and taken to the dreaded "torture chambers" within the prison and because he was so weak and unable to walk, he was dragged out from the interrogation room by the two prison warders and taken to another part of the prison building. They passed through two dirty empty rooms which had blood spatters on the floor and walls, and then they all entered a third room where they found two tall dark menacing men who he had never seen before but who appeared to be Special Branch Department officers. The Petitioner further states that the two men had guns and blunt objects with them and they were given a hand-written note by one of the prison warders escorting him and then he was left alone with them.

13. According to him, the two men started by telling him to relax and feel free and to forget the frustrations and degrading treatment he had undergone so far and freely tell them the identities of the people with whom he had tried to overthrow the Government of Kenya on 1st August 1982. That when he informed them that he had not been involved in the aforesaid coup attempt, the men got agitated, took their guns, cocked them, aimed them at him and menacingly threatened to shoot him on the head. They then began beating him mercilessly with the blunt objects and then tied his hands and legs with a rope and began hitting his testicles using an iron bar. They further pulled and squeezed his testicles several times causing him excruciating pain and when he screamed and yelled as he underwent the painful ordeal, the torment stopped and his torturers called the two prison warders and asked them to take him back to the interrogating room and gave them a hand written note. The Petitioner thus states that as informed by his advocate, the aforesaid torture, inhuman and degrading treatment constituted a violation of his fundamental right guaranteed by **Section 74** of the **Repealed Constitution**.

14. The Petitioner has also states that after the torture stopped, he was carried/dragged back to the interrogating room and the handwritten note was handed over to Major Robb, who was apparently the lead interrogator. Major Robb instructed the prison warders to take him for an identification parade and while the said parade was duly conducted, nobody picked him out as one of the coup plotters. After the aforesaid parade, he was removed from solitary confinement and locked up in a cell containing other military personnel all from the Kenya Air Force. He states that he remained in the said cell until sometime towards the end of January 1983 when he and several other military personnel were transferred to Kamiti Maximum Security Prison where he was incarcerated until 10th February 1983 when he was transported to Kahawa Garrison, a picture of him taken and he was given Kshs.1,000.00 as transport to his rural home.

15. That he and a few other Kenya Air Force personnel, while at the Kahawa Garrison Main Gate, were told that they had been dismissed from the Armed Forces and were never to be seen near a military establishment again. And that they were to proceed to their respective rural homes immediately and report weekly to their area Chiefs and District Officers until further notice. He therefore immediately boarded a bus to the Nairobi City Centre and later that evening took another bus and headed to his home in Suna East location, Migori District.

16. Upon arrival at his rural home, the Petitioner claims that he reported as ordered to his local Assistant

Chief and he initially narrated his ordeal to the then Assistant Chief, Mr Eliason Bonyo Aluoro, who then took him to Mr Wilson Ogwada Okach, Chief, Suna East and later to Mr Cyrus Gituai, District Officer (DO), Migori. After listening to his narrative, he was sent out of the DO's office to enable the administrators deliberate on his case. Thereafter, he was called back and the DO informed him that they were convinced he was telling the truth and he was advised to write a letter to the Department of Defence (DOD) requesting reinstatement to military service and to copy the same to him, the District Commissioner, South Nyanza and to the Chief, Suna East location. After complying with the DO's advice, he received a response from the DOD curtly advising him to channel his letter through his Unit. As he was preparing to write another letter to his Unit as directed, a person approached him and identified himself as a Special Branch Department officer. He informed him that all his grievances had been received by the Government and that he should be patient as his case was being reviewed. He waited in vain for the alleged review of his case but to-date the same has never been effected but later he received a Government Cheque No.024289 and a payment voucher of Kshs.5,247.00 dated 9th May 1984 which indicated that his service was for 4 years from 1st September 1978 to 31st January 1983 and that the cause of his discharge was "Service No longer required". He also received an extract of his service record which classified his conduct in service as having been "UNATISFACTORY" and that he had been dishonourably discharged from military service for committing a "Service Offence" and that he needed to "reform and behave well" in order to fit well into "Civilian life".

17. That after lodging countless complaints both written and in person to DOD, he was on 9th June, 1994 issued with another certificate of service which now classified his military conduct as "very good".

18. In the above regard, he now states that he has been informed by his advocate that **Section 176** of the **Armed Forces Act**, sets out nine (9) specific grounds under which servicemen like him could be discharged from the Kenya Armed Forces. Those grounds include:

- a) If within 2 years after the date of attestation, the CO has considered him unlikely to be an efficient member of the Armed Forces;
- b) For activities or behaviour likely to be prejudicial to the preservation of public security;
- c) If convicted of a civil offence;
- d) If pronounced by a medical officer to be mentally or physically unfit;
- e) On reduction of the establishment;
- f) At his own request on compassionate grounds;
- g) If for any reason his services are no longer required;
- h) If granted a commission;
- i) If sentenced to dismissal by a court martial.

19. According to him, it is abundantly clear from the above grounds and the contradictory documents issued to him and annexed to his Affidavit in support that the DOD had no valid reason to justify his discharge from military service. The Petitioner further states that he has been informed by his advocate that his subsequent discharge from military service was not only unlawful but that it also amounted to inhuman and degrading treatment and a deprivation of property as he was denied a livelihood and was discriminated against by persons employed in public offices in violation of **Sections 74, 75 and 82** of the **Repealed Constitution**. Further, that despite the commission of the offence of his irregular arrest and confinement under **Section 48** of the **Armed Forces Act (Cap 199)** none of the officers involved were ever charged. And that his advocate has informed him that the said irregular arrest and confinement also amounted to a violation of his right to personal liberty and secure protection of the law guaranteed under **Section 72 and 77** of the

Repealed Constitution.

20. Further to the above, he states that, he was unlawfully profiled, singled out, arrested, confined, tortured and subjected to inhuman and degrading treatment and later also unlawfully discharged from the Kenya Armed Forces simply because he was a Luo by tribe which actions amounted to discrimination on the basis of tribe by a person(s) holding public office contrary to **Section 82** of the **Repealed Constitution**.

21. Lastly, it is his contention that his 4 years of military service fall far short of the 21 years' period of colour service provided for in the **Armed Forces Act** as well as additional periods of colour service as provided under **Section 174 (5)** of the same Act. That some of the people he was employed with in the 1KR served the Kenya Armed Forces until retirement and most of them attained the rank of Warrant Officer 1 which is the highest rank attainable by enlisted servicemen.

For the above reasons, the Petitioner prays for orders as elsewhere set out above.

The 1st and 2nd Respondent's Case

22. The Respondents, while denying the allegations by the Petitioner, filed grounds of opposition to the Petition where they have prayed that the Petition should be dismissed as the Petitioner was not a member of the then Kenya Air Force but a member of the Kenya Army which agency did not participate in the 1982 attempted coup and the Petitioner has not established a proper nexus with the attempted coup as the basis of his discharge from the Army and the alleged violation of his fundamental rights and freedoms.

23. The Respondents further contend that the Petition is premised on a purely employment issue and yet the **Armed Forces Act** (now repealed) expressly conferred discretion on the military to remove or discharge an officer of the rank of the Petitioner if the Officer's services were no longer required.

24. Further, that the Petition should be dismissed as the Petitioner is not candid and has misrepresented facts relating to the 1982 attempted coup because whereas he relies on documents issued by the Government of Kenya to show that he was paid gratuity for the period he served in the military in compliance with the **Armed Forces (Pension & Gratuity) Act** and the regulations in operation then, he has in the same breathe claimed that he was discharged dishonourably because of his alleged participation in the 1982 attempted coup.

25. In addition, it is their case that the Petition should be dismissed as it is a veiled attempt, and abuse of Court process, to invoke jurisdiction to reassess the discretion conferred by statute to discharge persons from the military when their services are no longer required.

26. Lastly, they contend that the Petition should not be entertained as much time has passed since the incident complained of and the Petitioner has not demonstrated that he utilized the military's internal administrative mechanisms to try and address the alleged violation of his fundamental rights which remain allegations without proof. The Respondents thus pray that the Petition be dismissed with costs.

The Parties' Submissions

For the Petitioner

27. The Petitioner in his Written Submission dated 22nd August 2016, stated that for 86 days, between 16th November 1982 and 10th February 1983, he was unlawfully assaulted, arrested, searched, confined in water logged cells both in military barracks and in Naivasha and Kamiti Maximum Prisons, deprived of his personal property, interrogated, tortured and subjected to cruel and degrading treatment, denied the secure protection of the law as well as the protection against discrimination. That he suffered several injuries, endured great pain and mental anguish throughout the unlawful incarceration and his fundamental rights and freedoms as guaranteed by **Sections 72, 74, 75, 76, 77** and **82** of the **Repealed Constitution** were consequently violated by military and other Government agencies.

28. In addition, it was his submission that the severe physical injuries and trauma that he suffered and the scars that bear them witness were on 19th December 2013 and 10th January 2014 confirmed by Dr. Amugada and Prof. Chindia vide medical reports contained in his list of documents dated 22nd September 2014 which were duly filed and served upon the Respondents. That these facts have not been controverted by the Respondents and yet under **Rule 15(1)** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practise and Procedure Rules, 2013**, the Attorney General and other state organs' response to a Petition should only be by way of a replying affidavit and in the above circumstances, he has urged this Court to disregard the Respondents' grounds of opposition dated 23rd April 2014 as they are no answer to his allegations.

29. Further to the above, the Petitioner submitted that vide his Notice to Produce dated 22nd November 2014, he sought the production of various documents held by the 1st Respondent, in particular, the Petitioner's Personal File, Guard Room and Kenya Prisons' registers for the periods which the Petitioner is alleged to have been unlawfully held as well as the delay reports for the material period as required by **Section 72 (2) (a) and (b)** of the now **Repealed Armed Forces Act** and the Petitioner's Commanding Officer's written order to the officers-in-charge of both the Naivasha and Kamiti Maximum Prisons requiring the Petitioner's confinement as required under **Section 77(1)** of the said **Armed Forces Act**. That the Respondents did not produce any of the said documents at the hearing of the Petition and consequently the facts contained in the Petition and Affidavit in support thereof remain uncontroverted. In this regard he urged this Court to adopt its holding in **Captain (Rtd) Frank Mbugua Munuku v Kenya Defence Forces & Another [2013] [eKLR]** where it stated at page 3; *"the above being the position as regards the facts before me, I have no choice but to believe them as tendered and I say so and in agreement with the decision in Rev. Lawford Ndege Imunde v Republic J.R Petition No.693 of 2008* where the learned Judge stated as follows: *'the facts of this case are set out in the Petition and Affidavit in support of the Petition. These facts are not controverted by the Respondent. The effect of this is that I must take the facts set out as true and correct so that the only task before me is to consider whether they constitute a violation of the Petitioner's rights and if so what relief I should grant'. "*

30. On the submission by Counsel for the Respondents that the fact that the 1982 attempted coup was carried out by members of the Kenya Air Force and that the Petitioner who was a member of the Kenya Army could not have been involved in the attempted coup, the Petitioner expressed surprised at this late admission that he was not involved in the attempted coup since the Petitioner had, from the 16th November 1982 continuously informed his accusers and torturers that he had not participated in the attempted coup but had in fact heroically and proudly participated in the quelling of the same at the Nanyuki Air Base. That it was unfortunate that this fact was never conveyed to the officers of the 1st Respondent and other Government agencies between 16th November 1982 and 10th February 1983 and that the Petitioner had to undergo great pain and suffering before his innocence was reluctantly accepted and he was released from the unlawful confinement before being also unlawfully discharged from the military.

31. It was the Petitioner's further submission that the Respondents have without any proof whatsoever, submitted that the Petition should be dismissed since the Petitioner was discharged from military service after committing a service offence and that the Petitioner is litigating an employment issue that is statutorily time-barred. On his part, he has urged the Court to disregard this allegation since the Respondents, despite being given an opportunity to disprove the Petitioner's claims by availing the Petitioner's personal file to the Court, failed to produce the same which is in their care and custody. Furthermore, that although the Respondents had an opportunity to cross-examine the Petitioner on the issues raised in the submissions, no questions relating to the above issue were asked nor alluded to and consequently nothing relevant came out of the cross-examination which was conducted in Court on 18th January 2016. Consequently, that the Petitioner's evidence is and remains uncontroverted.

32. The Petitioner has also contended that like in the two cases referred to above, since the facts adduced by the Petitioner are not controverted by the Respondents, the sole issue for determination in this matter is therefore whether the Petitioner's fundamental rights and freedoms were violated. In this regard, he has urged the Court to likewise find that the Petitioner has made out a case that his fundamental rights and

freedoms guaranteed under **Sections 72, 74, 75, 76, 77 and 82** of the **Repealed Constitution** were, between 16th November 1982 and 10th February 1983, totalling 86 days, violated by officers from the 1st Respondent's ministry and other Government agencies.

33. In addition to the above, has submitted that the above fundamental rights and freedoms are now enforceable under **Articles 22 and 23** of the **Constitution 2010** and are also enshrined in **Articles 27, 28, 29, 40 and 50** of the **Constitution 2010** and as a result of the aforesaid violations of the said fundamental rights and freedoms, the Petitioner suffered great loss and damages and is entitled to compensation.

34. On quantum of damages, the Petitioner relied on the **Captain (Rtd) Frank Mbugua Munuku** case, where it was stated that in addressing the issue of damages, the Court ought to take into account the length and period of the unlawful detention as well as the violations and breaches of the fundamental rights and freedoms involved and the Court awarded the officer a global sum of **Kshs.7 Million** as general damages for the violation of his fundamental rights and freedoms. In addition to that submission, the Petitioner added as follows:

- i) That although the facts in the **Captain (Rtd) Frank Mbugua Munuku** case are somewhat similar to his case, the torture, inhuman and degrading treatment he underwent in the hands of his accusers and torturers exceeded that which Captain (Rtd) Munuku appears to have undergone.
- ii) A member of the Defence Forces who subjects a person to torture commits an offence and is liable on conviction to a fine not exceeding ten million shillings or imprisonment for a term not exceeding twenty five years or both.
- iii) A member of the Defence Forces who subjects a person to cruel, inhuman or degrading treatment commits an offence and is liable on conviction to a fine not exceeding five million shillings or imprisonment for a term not exceeding fifteen years or both.

35. In furtherance of the above facts, it was the Petitioner's other submission that since he was tortured and also subjected to cruel, inhuman and degrading treatment by the 1st Respondent's officers and who are covered by the provisions of the Armed Forces Act and who should have been charged, convicted, imprisoned and fined a total of Kshs.15 million, he urged the Court to award the sum of Kshs.15 million specifically for the torture, cruel, inhuman and degrading treatment he underwent throughout his unlawful detention.

36. Further, the Petitioner has urged this Court to award an additional sum of Kshs.15 million for the violations of his fundamental rights and freedoms. The Petitioner also relied on the case of **Maj. General Peter M. Kariuki v Attorney General [2014] eKLR** where the Court of Appeal enhanced an award of **Kshs.7 Million** to **Kshs.15 Million** for torture, degrading and inhuman treatment committed against the said **Maj. General Kariuki** who was the Commander of the Kenya Air Force at the time. Further that, even though he held the relatively low rank of senior private, the suffering he underwent and the special circumstances of his case as well as the fact that the value of money, particularly the Kenyan currency has considerably gone down with inflation having hit a record high, he has urged the Court to award a global sum of Kshs.30 Million as damages for the violation of his fundamental rights and freedoms in addition to an award in his favour for costs of the Petition.

For the Respondents

37. In his Written Submissions dated 23rd April, 2014, Mr. Thande Kuria, learned litigation Counsel for the Respondents has sought the dismissal of the Petition basing his arguments on the grounds of opposition elsewhere explained above. He submitted in that regard that the Petitioner has not demonstrated how, whilst deployed in the Kenya Army, he could possibly be falsely implicated in the 1982 attempted coup which as a matter of fact and common knowledge was orchestrated by the Kenya Air Force and not the Kenya Army, a fact that he has urged this Court to take judicial notice of.

38. Counsel further submitted that it is not plausible that the Government would pay gratuity to the

Petitioner, a fact admitted in the pleadings and documents relied on in support of the Petition, in a situation where the Petitioner alleges that he was discharged unfairly from the Military.

39. Further, that military laws and procedure permit a person to be discharged from the military in a situation where his services are no longer required. And if the Petitioner felt that he was unfairly dismissed, then that is a labour issue that ought not to be litigated herein since the **Employment Act** which in any event has a statutory limitation of 3 years' from the time the alleged events occurred. That therefore any such claim is also time-barred apart from being devoid of merit.

40. It was Counsel's further submission that although the **Repealed** and the **Constitution 2010** have no limitation of time for claims arising out of constitutional violations and issues founded on human rights, this Petition can be decided within the **Industrial Court (now the Employment and Labour Relations Court)** since the Petitioner was discharged and paid gratuity and is making allegations of torture and degrading treatment to try and get compensation in a matter where he knows very well that there was no possibility of proof.

41. Counsel concluded by submitting that the Petitioner was not in the Kenya Air Force and his allegations of being profiled and singled out for participating in the 1982 attempted coup is too remote and should be rejected by this Court. That it is also not a disputed fact in the Petition that the Petitioner was discharged on grounds that his services were no longer required having also committed a service offence. That the Assessment of Service Form further indicates that gratuity was paid according to the regulations in operation then for the four year period the officer was in service and that official records are destroyed after a period of 6 years and that therefore the Petitioner should not be encouraged to hide behind an unfounded constitutional Petition to try and litigate employment issues that are statutorily time barred. That the Petition is, for the above reasons, an abuse of the Court process and should be dismissed with costs.

Determination

42. This Petition is only one of the many arising from the events of 1st August 1982 when Kenya Airforce servicemen rose up in a failed attempt at overthrowing the Government of the Republic of Kenya. While a majority of the Petitions were filed by the said servicemen, a number were also filed by University Students at the time as well as other people including servicemen of the Kenya Army such as the Petitioner.

43. The first issue to address therefore is the question whether the facts as placed before me point to the fact that the Petitioner suffered torture and degrading and inhuman treatment while in the custody of the agents of the Kenyan Government for 86 days at Naivasha and Kamiti prisons as well as Military establishments as alleged. In that regard, one of the continuing difficulties faced by the Petitioners such as the present one is the retrieval of medical records showing the actual effect of the alleged injuries that they suffered over 30 years ago. Our Courts have therefore treated each case in its own circumstances and depending on how and what kind of evidence is presented before them.

44. In the present case, the Petitioner has relied on the case of **Captain (Rtd) Frank Mbugua Munuku (Supra)** to make the point that where allegations of fact are made and the Respondent is unable to controvert those facts, then the facts must be taken as being true. That position should generally be upheld as was also the position taken by the Court in **Lawford Ndege Imunde (Supra)** among other cases. However, as is also the law, **Sections 107 and 109** of the **Evidence Act** require that he who alleges a fact must also prove it – See **Monica Wangu Wamwere v AG, Petition No.196 of 2013**. The Petitioner, to his credit has brought forth two medical reports from Dr. Amugada and Prof. Chindia which were admitted on the record without objection. They indicate that the Petitioner *inter alia* still has scars and two swellings on the right ear and right hand as a result of his ordeal as indicated above and the residual psychological effects are characterized by bursts of crying while being examined and that he was recommended for psychotherapy.

45. Aside from the above facts, the Petitioner testified in open Court and so I had the opportunity to watch

him, noted and recorded his evidence and I have no doubt that he was truthful. As to the question whether he could not, as a member of the Kenya Army have been connected to the attempted coup, my view is that the evidence before me points otherwise. That evidence has been elaborately summarised elsewhere above.

46. It is therefore my finding that the Petitioner has indeed proved that he was tortured and treated inhumanely and in a degrading manner as he pleaded and testified.

47. What is the law as juxtaposed with the above facts? Before I answer that question, I should dispose of two common pleas by the Respondents which have also been raised in the present Petition viz:

i) delay in filing the Petition.

ii) that the Petition is an employment related matter disguised as a Constitutional Petition.

48. On the issue of delay in filing the Petition, this and other Courts have taken the view that whereas there is no express expectation of the **Repealed or 2010 Constitutions** or any other law that claims pegged on alleged violations of fundamental rights have no limitation period, the need for fairness in giving Respondents an opportunity to defend such claims and to avoid evidence disappearing, memories lapsing, or witnesses not being available necessitates that claimants ought to, at the very least explain any delay. This is why in **Abraham Kaisha Kanzika alias Moses Savala Keya t/a Kapco Machinery Services and Milano Investments Limited v Governor Central Bank of Kenya and 2 Others, Misc. Civil Appl. 1759 of 2004**, the learned Judge observed thus:

“In my view failure by a Constitutional Court to recognize general Principles of Law including, limitation expressed in the Constitution would lead to legal anarchy or crisis. It would also trivialize the constitutional jurisdiction in that Applicants would in some case ignore the enforcement of their rights under the general principles of Law in order to convert their subsequent grievance into a 'constitutional issue' after the expiry of the prescribed limitations periods...”

The above findings notwithstanding, I also reiterate the finding in **Charles Gachathi Mboko v Attorney General, Civil Case No.833 of 2009 (O.S.)**, where the Court stated thus:

“It must however go on record that although this Court has been lenient on parties that seek redress for violation of fundamental rights in past political regimes, it is obvious that the Court's indulgence is being abused by parties that have slept on their rights and give no serious explanations for the delay. In subsequent matters, obviously that issue will be at the fore of the Court's consideration of any claim.”

49. The above statements were made not as an expression of any law but as a rule of practice based on sound and proper exercise of discretion – see **D'souza v Union of India 1976 A.S.R. 91**. In that regard, I note that in the present case, the Petitioner stated in oral evidence that he was unable to file his claim in time because he was *inter alia* assured that the matter of his reinstatement for employment, his innocence of the coup claims and compensation were being looked into. He produced unchallenged correspondence in that regard with his local Chief, District Officer, District Commissioner as well as the Department of Defence. It was also his explanation that having been warned, on his release, not to set his feet near any military establishment, he was fearful of the existing regime. I find both explanations reasonable in the circumstances and will proceed to address his claims on their merits despite the obvious delay aforesaid.

50. On whether the present Petition is an employment dispute and not one seeking remedies for constitutional violations, a casual glance at the Petition would show that the Respondents' submission in that regard is misguided. The claim at prayer (b) thereof which is employment related (it seeks reinstatement to Military Service and faults the Respondents for refusing to do) is predicated on **Section 74 of the Repealed Constitution** which protects every person from cruel, degrading and inhuman treatment, a fundamental right. It is therefore not an employment issue *per se* but flows and is

interconnected with violation of his fundamental rights and it cannot therefore be true that the Petition is misplaced because it is one predicated on fundamental rights and freedoms, a matter squarely within this Court's jurisdiction. For avoidance of doubt prayer (b) reads thus:

“A declaration that the failure, refusal and/or neglect of the Chief of General Staff and the Kenya Army commander to redress the Petitioner's written complaints and pleas for review of his case and re-instatement back in service in accordance with Sections 83 and 226 of the Armed Forces Act (Cap 199) constituted cruel, degrading and inhuman treatment and was in violation of Section 74 of the Constitution of Kenya.”

I will address the above issue in that context shortly but suffice it to say that the Respondent's objections are both overruled.

51. Turning to the applicable law, the Petitioner has alleged violation of **Sections 72,73,74,75,76,77 and 82 of the Repealed Constitution** which in summary provided for the following fundamental rights and freedoms:

- i) Section 72 – Protection of right to personal liberty.
- ii) Section 74 – Protection from inhuman and degrading treatment as well as torture.
- iii) Section 75 – Protection from deprivation of property.
- iv) Section 76 – Protection against arbitrary search or entry.
- v) Section 77 – Provisions to secure protection of the law.
- vi) Section 82 – Protection from discrimination on grounds of race, e.t.c.

52. From my rendition of the evidence tendered before me, it seems to me that there is no evidence of discrimination against the Petitioner on account of the grounds set out in **Section 82** i.e. race, tribe, place of origin, residence or other local connexion, political opinions, creed or sex. In fact in his Petition and in submissions, the Petitioner steered clear of this allegation save its mention in evidence and without particulars in the Petition at prayer (b) of the same.

53. If it is his claim in any event that he was discriminated against because he was a “jalu”, the fact that he was arrested and subjected to inhuman and degrading treatment had nothing to do with any differentiation on ethnic grounds. It was because someone had claimed that he was the “jalu” at 1KR who had participated in the Court attempt and that was a title and nomenclature not a discriminatory term nor were the subsequent acts of mistreatment based on any discrimination and so I find.

54. Similarly, **Section 77** is inapplicable to the Petitioner's circumstances because **Section 77(1)** provides as follows:

“(1) If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

(2) – (15) ...”

55. Because he was never charged in any Court (including the Court Martial) this right could not have been available to him and his reliance on **Section 77** is therefore misguided. It was a right available only to accused persons in Court one of whom he was not.

56. On **Sections 75 and 76** which protected the right not to be deprived of property and not to be subjected to any search of his person or property, it was the Petitioner's claim that on 17th November

1982, he was frog marched to the Married Quarters at the Nanyuki Army Barracks and his house was searched before it was locked up and his family thrown out. His personal properties were also not given to his wife or himself upon his release. The Respondent failed to respond to these allegations and on those issues, and without belabouring the point, there was no lawful reason why the Petitioner was subjected to those actions and his claims thereof must succeed.

57. The above findings leave me with two issues that form the gravamen of the present Petition; protection of the right to personal liberty and the protection from inhuman and degrading treatment under **Sections 72 and 74 of the Repealed Constitution.**

On **Section 72**, the same provides as follows:

1. No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases –

a) in execution of the sentence or order of a court, whether established for Kenya or some other country, in respect of a criminal offence of which he has been convicted;

b) in execution of the order of the High Court or the Court of Appeal punishing him for contempt of that court or of another court or tribunal;

c) in execution of the order of a court made to secure the fulfillment of an obligation imposed on him by law;

d) for the purpose of bringing him before a court in execution of the order of a court;

e) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law of Kenya;

f) in the case of a person who has not attained the age of eighteen years, for the purpose of his education or welfare;

g) for the purpose of preventing the spread of an infectious or contagious disease;

h) in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community;

i) for the purpose of preventing the unlawful entry of that person into Kenya, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Kenya or for the purpose of restricting that person while he is being conveyed through Kenya in the course of his extradition or removal as a convicted prisoner from one country to another; or

j) to such extent as may be necessary in the execution of a lawful order requiring that person to remain within a specified area within Kenya or prohibiting him from being within such an area, or to such extent as may be reasonably justifiable for the taking of proceedings against that person relating to the making of any such order, or to such extent as may be reasonably justifiable for restraining that person during a visit that he is permitted to make to a part of Kenya in which, in consequence of the order, his presence would otherwise be unlawful.

2) A person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention.

3) A person who is arrested or detained—

a) *for the purpose of bringing him before a court in execution of the order of a court; or*

b) *upon reasonable suspicion of his having committed, or being about to commit, a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.*

4) *Where a person is brought before a court in execution of the order of a court in any proceedings or upon suspicion of his having committed or being about to commit an offence, he shall not be thereafter further held in custody in connexion with those proceedings or that offence save upon the order of a court.*

5) *If a person arrested or detained as mentioned in subsection (3) (b) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall, unless he is charged with an offence punishable by death, be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.*

6) *A person who is unlawfully arrested or detained by another person shall be entitled to compensation therefor from that other person.”*

58. I have deliberately reproduced the whole Section verbatim because in previous decisions such as **Prof. Maina wa Kinyati v the Attorney General, Petition No.595 of 2012**, this Court has expressed the view that this **Section** speaks for itself and once I have accepted the Petitioner’s evidence that he was unlawfully incarcerated for 86 days, and that the defence offered by **Section 72(3) (b)** has not been invoked by the Respondents, it follows that the Petitioner’s incarceration, whatever the offence that he was suspected of having committed, was unconstitutional and by dint of **Section 72(6)** above, he is entitled to the remedy of compensation. There is little more to say on this straightforward matter.

59. Turning now to **Section 74(1)** of the **Repealed Constitution**, the same provides as follows:

“no person shall be subject to torture or to inhuman or degrading punishment or other treatment”

60. **Article I** of the **Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** defines “torture” as follows:

“For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

61. Further to the above, the European Court of Human Rights has defined torture and inhuman treatment in the **Greek Case 1969 Y.B. Eur. Conv. On H.R. 186 (Eur. Comm’n on H. R.** in the following terms:

“The notion of inhuman treatment covers at least such treatment as deliberately causes

suffering, mental or physical, which, in the particular situation is unjustifiable. The word “torture” is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment. Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others, or drives him to an act against his will or conscience.”

62. The issue of what amounts to torture and cruel, degrading treatment has also been defined in **Samwel Rukenya Mburu v Castle Breweries, Nairobi HCC 1119 of 2003**, per Visram J. (as he then was) as follows:

“Prohibition against torture, cruel or inhuman and degrading treatment implies that an “action is barbarous, brutal or cruel” while degrading punishment is “that which brings a person dishonour or contempt”

Further in **Jestina Mukoko v Attorney General (36/09) [2012] ZWSC 11 (20 March 2012), Constitution Application No.36 of 2009**, the Supreme Court of Zimbabwe observed that:

“Section 15(1) of the Constitution provides that: “(1) No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment”

In this case the only relevant concepts are “torture”; “inhuman treatment” and “degrading treatment”. They make up the three key elements of the protection of a person’s dignity and physical integrity form the prohibited treatment at the hands of public officials.

*Section 15(1) of the Constitution enshrines one of the most fundamental values in a democratic society. **Chahal v United Kingdom [1996] 23 EHRR 413 para 79**. It is an absolute prohibition. It is because of the importance of the values it protects that the rules by which the prohibition imposes the obligations on the State are peremptory in effect. The most conspicuous consequence of this quality is that the principle at issue cannot be derogated from by the State even in a State of public emergency.*

The qualities of absoluteness in the sense of being an unconditional prohibition is one of the most fundamental standards of a democratic society. They are also designed to ensure that the prohibition produces a deterrent effect in that it signals in advance to all public officials and private individuals that it is an absolute value form which nobody must derogate. The fact that torture, inhuman and degrading treatment is prohibited by a peremptory provision serves to render null and void any act authorising such conduct.”

The Court then added thus:

“There is a distinction intended to be made under Section 15(1) of the Constitution between torture on the one hand and inhuman or degrading treatment on the other. The distinction between the notion of torture and the other two concepts lies principally in the intensity of physical or mental pain and suffering inflicted, in respect of torture, on the victim intentionally and for a specific purpose. Torture is an aggravated and deliberate form of inhuman or degrading treatment. What constitutes torture, or inhuman or degrading treatment depends on the circumstances of each case.

*Inhuman treatment is treatment which when applied or inflicted on a person intentionally or with premeditation causes, if not actual bodily injury, at least intense physical or mental suffering to the person subjected thereto and also leads to acute psychiatric disturbance during interrogation: **Ireland v United Kingdom [1978] 2 EHRR 167 para 167.”***

63. I adopt the reasoning in the above cases and noting that the Petitioner, for the 86 days that he was unlawfully held, was also subjected to intense beatings, incarceration in water logged cells, starvation and

promises of food and water if he confessed to participation in the attempted coup, threats of being shot to death, the hitting and squeezing of his testicles using an iron bar and being held in solitary confinement, then I am certain that the threshold expected of any claim of torture, inhuman and degrading treatment was reached and there being no defence to torture, it matters not whether the Respondent has denied the above actions.

64. Once I have accepted the Petitioner's evidence in that regard, and I have, the Respondent, on behalf of the State must be held responsible for violation of the Petitioner's rights as claimed.

65. Lastly, I should only add that whereas allegations have been made of alleged breaches of the **Armed Forces Act**, once I have made categorical findings of breaches of the **Repealed Constitution**, I see no reason to delve into breaches of the said Act on the same facts.

Remedies

66. In the Petition, the Petitioner has prayed for the following declarations and orders:

a) A declaration that the circumstances under which he was arrested, searched, interrogated, tortured and unlawfully incarcerated by military and other government authorities between 16th November 1982 and 10th February 1983 and unlawfully discharged from military service constituted violations of his rights and freedoms of liberty, protection from torture, inhuman and degrading treatment, deprivation of property, secure protection of the law, protection against arbitrary search and entry and protection from discrimination guaranteed by sections 72, 74, 75, 76, 77 and 82 of the now repealed Constitution of Kenya.

b) A declaration that the failure, refusal and/or neglect of the Chief of General Staff and the Kenya Army commander to redress the Petitioner's written complaints and pleas for review of his case and re-instatement back in service in accordance with Sections 83 and 226 of the Armed Forces Act (Cap 199) constituted cruel, degrading and inhuman treatment and was in violation of Section 74 of the Constitution of Kenya.

c) Award of damages consequent upon the above declarations and/or such orders, writs or directions for the purpose of enforcing and securing the enforcement of the provisions hereinabove disclosed as having been violated against your Petitioner.

d) The Respondents to pay the costs of the Petition.

67. Save for the claims predicated on **Sections 72, 74, 75 and 76**, all other claims in prayer (a) have been disallowed for reasons given above. Regarding prayer (b), I have held that the only evidence of torture, inhuman and degrading treatment relate to the physical and mental torture that the Petitioner was subjected to. What of the refusal to reinstate him to military service? There is no doubt that the Petitioner was dismissed from military service for alleged involvement in the 1982 attempted coup. He was however never charged nor convicted of any coup related offence. To that extent therefore his removal may have been unlawful but that is not the issue before me *per se*. Where is the evidence that as result of his unlawful dismissal, he suffered inhuman and degrading treatment contrary to **Section 74** of the **Repealed Constitution**? I find none and in any event, having been paid his gratuity for services rendered, it is unclear to me that **Section 74** of the **Repealed Constitution** was violated. The claim in that regard is therefore dismissed.

68. On prayer (c) which relates to damages consequent upon a favourable violation of fundamental rights and freedoms, in **Gitabu Imanyara & 2 Others v AG C.A No.98 of 2014: [2016] eKLR** the Court of Appeal stated thus;

“The primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration

only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration. Public policy considerations is also important because it is not only the Petitioner's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy."

69. As to the quantum of damages payable, in **Koigi Wamwere v AG, C. A No.86 of 2013; [2015] eKLR** the same Court opined thus:

"Accepting that the award of damages is not an exact science, and knowing that no monetary sum can really erase the scarring of the soul and the deprivation of dignity that some of these violations of rights entailed, we find and hold that the appellant is entitled instead to damages in the global sum of Kshs.12 Million with interest at Court rates from the date of the Judgment of the High court appealed against."

70. In **Maj. General Peter M. Kariuki v AG (supra)**, the Court expressed the view that each case ought to be treated in its own merits and stated thus:

"... this Court has stated time and again that in assessment of damages, it must be borne in mind that each case depends on its own facts; that no two cases are exactly alike, and that awards of damages should not be excessive."

71. I am duly guided and noting the length of incarceration, the effects of the torture that the Petitioner was subjected to and the unlawful search and entry into his house, and noting the awards in the above cases, it is my view that the sum of Kshs.10 Million is sufficient compensation to the Petitioner aside from the declaration in prayer (a) of his Petition.

72. As for costs, they follow the event and so the Petitioner shall have costs thereof.

Disposition

73. For the above reasons, Judgment is entered in favour of the Petitioner against the Respondents in the following terms:

a) A declaration that the circumstances under which he was arrested, searched, interrogated, tortured and unlawfully incarcerated by military and other government authorities between 16th November 1982 and 10th February 1983 constituted violations of his rights and freedoms of liberty, protection from torture, inhuman and degrading treatment, secure protection of the law, protection against arbitrary search and entry guaranteed by Sections 72, 74, 75 and 76 of the now repealed Constitution of Kenya.

b) An award of Kshs.10 Million as damages is hereby made to the Petitioner as compensation pursuant to (a) above.

c) The Respondents to pay the costs of the Petition to the Petitioner.

74. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 7TH DAY OF JULY, 2017

ISAAC LENAOLA

JUDGE

DELIVERED AND SIGNED AT NAIROBI THIS 12TH DAY OF JULY, 2017

JOHN M. MATIVO

JUDGE